90-322

AUG 20 1990

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UNITED STATES SUPREME COURT

OCTOBER, 1990 TERM

DORA VALLANCE, Petitioner

-vs-

JAMES LIONEL BREWBAKER
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE 53RD JUDICIAL CIRCUIT
COURT FOR THE STATE OF MICHIGAN

"PETITION FOR WRIT OF CERTIORARI"

Counsel for Petitioner:
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QUESTION PRESENTED FOR REVIEW

THIS HONORABLE COURT SHOULD GRANT PLAINTIFFS' PETITION, WHERE THE ENFORCEMENT OF SANCTIONS AGAINST PLAINTIFF IS BASED ON HER VIOLATION OF AN ORDER WHICH SHE DID NOT HAVE NOTICE OF, AND THEREFORE CONSTITUTES A VIOLATION OF HER RIGHT TO DUE PROCESS AS GUARANTEED BY THE UNITED STATES CONSTITUTION.

LIST OF PARTIES TO ORIGINAL ACTION

Dora Vallance - Plaintiff

James Brewbaker - Defendant

Stanley Kozial[1] - Defendant

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[1] Plaintiff settled with Kozial and he was susequently dismissed from the case.

TABLE OF AUTHORITIES

Cases	Page
Cross Co v UAW Local No. 155, 377 Mich 202, 216; 139 NW2d 694 (1966)	6
Marks v United States, 430 US 188, 192; 51 L Ed 2d 260; 97 S Ct 990 (1977).....	7
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CONCISE STATEMENT OF JURISDICTIONAL GROUNDS

The order which plaintiff seeks review of was entered June 9, 1989. The Michigan Supreme Court denied discretionary review on May 30, 1990.

Plaintiff respectfully submits that this Honorable Court has jurisdiction to issue a writ of certiorari as prayed for, pursuant to 28 USC § 1257.

CONCISE STATEMENT OF FACTS & PROCEEDINGS

On April 10th, 1985, during litigation between the parties in Michigan's 53rd Judicial Circuit Court, that court entered an "Emergency Ex-Parte Order Extending Medical Releases," without motion or any other written documentation, and without notice to plaintiff or her attorney. A copy of this secret order is attached as Appendix B. This order attempted to "revive" medical authorizations, which had already expired, signed by plaintiff pursuant to an earlier court order.[2]

Immediately after obtaining this

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[2] This earlier order, entered January 22, 1985, while requiring Plaintiff to sign authorizations, also provided that authorizations would "be valid only until April 8th, 1985, the anticipated date of trial." As required by that order, the expiration date was noted on the face if the medical authorizations.

ex parte order, defense counsel proceeded to Community Memorial Hospital in Cheboygan, Michigan, in order to obtain medical records belonging to plaintiff. The medical records custodian, faced with a court order and an authorization that stated on its face that it had expired two days earlier, refused to produce the records.

Plaintiffs' counsel was contacted and was told that someone was present at the hospital with a release dated April 10, 1985. Plaintiff's counsel, having the benefit of the client's presence in his office, informed the hospital that plaintiff had never signed such a release and that it should be treated as null and void.

Plaintiff first learned abut the ex-parte order that the trial court had entered on the next day of trial, Friday,

April 12, 1985.[3] At that time, Defendants stood up in open court, and accused Plaintiff of having violated the ex-parte order (which plaintiff did not know existed), and requested a dismissal of plaintiff's lawsuit. Despite the facts that the order, when entered, was not served on Plaintiff, and that Plaintiff did not know an order had been entered, the trial court found a "violation" of its order and that the case would be dismissed because "[p]laintiff didn't give a medical release, notwithstanding the Court's Order."

Plaintiff's lawsuit was dismissed and the trial court went on to grant

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[3] Plaintiff's counsel testified before the trial court regarding the imposition of sanctions and clearly indicated that he did not know about the order at the time Plaintiff asserted her medical privilege. TR 5/5/86 9-10, Appendix G.

defendant's motion for costs and attorney fees under Michigan Court Rule (MCR) 2.313(B), eventually assessing attorney fees totaling over $8,000. A copy of the trial court's Order is attached as Appendix C. Plaintiff paid those sanction moneys into a bond, for the protection of defendant. The trial court released that bond by order dated June 9, 1989, Appendix A.

Plaintiff sought application for leave to appeal this release of bond monies to the Michigan Court of Appeals, which denied plaintiff's application on September 11, 1989, Appendix D. A request for reconsideration was likewise denied, Appendix E on November 8, 1989. The Michigan Supreme Court issued its order denying leave to appeal on May 30, 1990, Appendix F.

Plaintiff's lack of notice of the order, and the consequent denial of due

process of law, was raised orally in the trial court at the time the Defendant moved for release of the bond monies. Plaintiff likewise raised the notice issue in the Michigan Court of Appeals and Michigan Supreme Court.

ARGUMENT

THIS HONORABLE COURT SHOULD GRANT PLAINTIFFS' PETITION, WHERE THE ENFORCEMENT OF SANCTIONS AGAINST PLAINTIFF IS BASED ON HER VIOLATION OF AN ORDER WHICH SHE DID NOT HAVE NOTICE OF, AND THEREFORE CONSTITUTES A VIOLATION OF HER RIGHT TO DUE PROCESS AS GUARANTEED BY THE UNITED STATES CONSTITUTION.

It is well established in the law that one must have knowledge of an order before he or she can be held in contempt or otherwise punished for failing to comply with its terms. Wilson v North Carolina, 169 US 586, 600; 42 L Ed 865, 18 S.Ct. 435 (1897). Cross Co v UAW Local No 155, 377 Mich 202, 216; 139 NW2d 694 (1966). People v Matish, 384 Mich 568; 184 NW2d 915 (1971). The record contains nothing that shows plaintiff or her counsel knew that the trial court was being petitioned on an ex parte basis, or that any order was entered which purported to control

plaintiff's conduct. Plaintiff knew nothing of the order entered against her.

This Court has previously stated that, fundamental to our concept of liberty is the "notion that persons have a right to fair warning of that conduct which will give rise to... penalties..." Marks v United States, 430 US 188, 192, 51 L Ed 2d 260, 97 S Ct 990 (1977). To punish plaintiff by releasing those bond monies, for failing to comply with an order she did not know existed, violates this "fundamental concept of liberty," and likewise violated plaintiff's right to due process of law.

Plaintiffs' petition should be granted.

RELIEF REQUESTED

WHEREFORE, Plaintiff specifically requests that this Honorable Court will grant Plaintiff's petition, issue its Writ of Certiorari to the 53rd Judicial Circuit Court for the State of Michigan, and on final hearing reverse the trial court's order dated June 9, 1989, releasing bond monies to defendant.

Dated: August 20, 1990

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A. ORDER RELEASING BOND, 6/9/89
53rd Judicial Circuit Court
Cheboygan County, Michigan

B. EMERGENCY ORDER EXTENDING MEDICAL AUTHORIZATION, 4/10/85
53rd Judicial Circuit Court
Cheboygan County, Michigan

C. ORDER, 7/1/86
53rd Judicial Circuit Court
Cheboygan County, Michigan

D. ORDER, Denying Leave to Appeal
9/11/89; Michigan Court of Appeals

E. ORDER, Denying Rehearing
11/8/89
Michigan Court of Appeals

F. ORDER, Denying Leave to Appeal
5/30/90; Michigan Supreme Court

G. TRANSCRIPT, 5/5/86, p 9-10
Vallance v Brewbaker
File: 82-4842-NI
53rd Judicial Circuit Court
Cheboygan County, Michigan

STATE OF MICHIGAN
53RD JUDICIAL CIRCUIT COURT

DORA VALLANCE Plaintiff	)	
vs	)	File: 82-4842-NI Hon: Robert C. Livo
JAMES BREWBAKER	)	

ORDER RELEASING BOND

At a session of said court held in the City and County of Cheboygan, State of Michigan on May 15, 1989.

PRESENT: Hon. Robert C. Livo
Circuit Judge

Defendant Brewbaker moved to release the bond filed in this matter. The parties appeared and the Court heard argument. The Court decided to grant the motion for the reasons stated on the record.

IT IS ORDERED THAT:

1. Defendant's motion is granted and that $5,560.75 ($5489.75 originally awarded by this Court, plus $71.00 taxed by the Court of Appeals) the bond is

released to Defendant Brewbaker's attorneys, Bensinger, Combs & Cotant.

2. The remainder is released to Plaintiff's attorneys, Sumpter & Perry, P.C.,

Dated: June 9, 1989 /s/ Robert C. Livo
Circuit Judge

APPENDIX "A"

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY
OF CHEBOYGAN

DORA VALLANCE Plaintiff	)	File: 82-4842-NI
vs	)	Hon. Robert C. Livo
JAMES BREWBAKER	)	

EMERGENCY ORDER EXTENDING MEDICAL AUTHORIZATIONS

At a session of said Court held in the City of Cheboygan, County of Cheboygan and State of Michigan on the 10th day of April, 1985.

Present: Honorable Robert C. Livo
Circuit Judge

Defendant James L. Brewbaker, having moved for an emergency order to extend the dates of the authorization for release of medical information which was previously granted by this court, and the court being fully advised in the premises;

IT IS HEREBY ORDERED that the medical authorizations previously granted in this matter are hereby extended and

shall be valid until April 19, 1985 or until such time as trial in this matter is completed.

/s/ Robert C. Livo
Circuit Judge

APPENDIX "B"

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF CHEBOYGAN

DORA VALLANCE Plaintiff	)	File: 82-4842-NI
vs JAMES BREWBAKER	)	

ORDER

At a session of said Court, held in the City of Cheboygan, County of Cheboygan, State of Michigan, this 1st day of July, 1986.

PRESENT: Hon. Robert C. Livo
Circuit Judge

The Court, having reviewed the petitions of Defendants Brewbaker and Kozial, having heard argument from both Plaintiff and Defendant, and having entered an Opinion as to the matter of allowing the taxation of costs and attorney fees herein;

THEREFORE, IT IS ORDERED AND ADJUDGED that Defendant Brewbaker is hereby granted the sum of $5,385.43 in attorney fees and taxable costs in the amount of

$104.32.

IT IS FURTHER ORDERED AND ADJUDGED that Defendant Kozial is granted the sum of $2,650.26 in attorney fees.

IT IS FURTHER ORDERED that these amounts are assessed against both Plaintiff, Dora Vallance, and her attorney, Jerry L. Sumpter, J.D.

/s/ Robert C. Livo
Circuit Judge

APPENDIX "C"

STATE OF MICHIGAN
COURT OF APPEALS

Dora Vallance	)	
	)	Docket: 118587
vs	)	L.C. 82-4842-NI
James Brewbaker	)	
	)	

ORDER

The Court orders that the application for leave to appeal is DENIED for lack of merit in the grounds presented. State ex rel Prosecuting Attorney for Ingham County v American Amusement Co., Inc, 71 Mich App 130 (1976); Plumbers & Pipefitters Local Union #190, v Wolff, 141 Mich App 815 (1985); Maness v Meyers, 419 US 449, 458-459; 95 S Ct 584; 42 L Ed 2d 574, 583 (1975); MCR 7.209(F)(1)(b).

[SEAL]

Dated: 9/11/89

/s/ Nobert G. Jaworski
Chief Clerk

APPENDIX "D"

STATE OF MICHIGAN
COURT OF APPEALS

Dora Vallance	)	
	)	Docket: 118587
vs	)	L.C. 82-4842-NI
James Brewbaker	)	
	)	

ORDER

The Court orders that the motion for rehearing is DENIED.

Dated: 11/8/89

/s/ Norbert G. Jaworski
Chief Clerk

APPENDIX "E"

STATE OF MICHIGAN
SUPREME COURT

Dora Vallance	)	SC: 87887
	)	COA: 118587
vs	)	L.C. 82-4842-NI
James Brewbaker	)	
_____	)	

ORDER

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

Dated: 5/30/90
/s/ Corbin R. Davis
Clerk

APPENDIX "F"

A. ..only until April 8th, 1985. The anticipated date of the trial."

That's the authority that I had that there were no valid outstanding authorizations. I did not have an ex parte order, I did not have a motion, I did not have anything that even indicated that the Court had ordered that the prior authorizations that she signed under this order extended. I had nothing. I was sitting in my office trying to deal with this thing on the basis of a telephone call.

Q. Now, based upon your recollection, did the trial start on April 8th?

A. The trial started on April 8th.

We were before the Court, selected a jury, and then we were to continue the trial on either Thursday or Friday of that week. April 8th was a Monday. April 10th was a Wednesday when this decision occurred.

Q. And at the time of the phone conference, you had no order, ex parte order, or any order of any type or any motion of any type?

MR. GRIFFIN: Objection -- leading question your Honor.

THE COURT: I'll sustain it.

BY MR. HENKE:

Q. On April 10th, at the time of the telephone conference did you have in your possession any type of order that modified this January 22nd --

A. No -- nor did I know that one existed, as I recall. I didn't

know that. I knew that in order for the defense to obtain medical records from plaintiff, they were obligated, under this order here, 1/22/85, to provide my office with copies of the medical authorizations as issued. I do not have a medical authorization in my hand. I had not received one. None had been mailed to me, nor did I know that any existed. All I had was a phone call.

Q. Prior to April 10th, did defense counsel comply with this order and supply you with copies of authorizations as issued as per the Court's order?

A. No, they had not, not in any way.

Q. How about other particular authorizations?

A. Prior to March -- or prior to April 10th, they had fully

complied with the order by sending me a copy of the authorizations, dated, and the facility to whom the authorizations were directed. On the date of April 10th, they did not do that. They were merely running around the country handing authorizations that had been extended by an ex parte order without motion to all the health care facilities at that time, insist that those facilities give them a complete copy of the [end of page]

APPENDIX "G"